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IN THE

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
Petitioners,

v.

CBS CORPORATION, CBS BROADCASTING INC., CBS TELEVISION STATIONS, INC., CBS STATIONS GROUP OF TEXAS L.P., AND KUTV HOLDINGS, INC.,
Respondents.

On Petition for Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Third Circuit correctly held that the Federal Communications Commission violated the Administrative Procedure Act, 5 U.S.C. § 551, *et seq.*, by refusing to acknowledge that it had retroactively implemented a fundamental change in its restrained enforcement policy for broadcast indecency when it imposed a $550,000 fine on the twenty CBS-owned television stations for the unauthorized and unintentional broadcast of a partially-covered female breast for nine-sixteenths of a second during the 2004 Super Bowl halftime show.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondent CBS Broadcasting Inc. makes the following disclosure: CBS Corporation, a publicly held company, owns an interest of 10 percent or more in CBS Broadcasting Inc.

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PRELIMINARY STATEMENT

The Federal Communications Commission's ("FCC's") petition for writ of certiorari fails to present either a split in the circuit courts or an important issue of federal law that requires this Court's review of the decision below. The FCC's claim of "substantial overlap" between the Third Circuit's decision and *FCC v. Fox Television Stations, Inc.*, No. 07-582 (argued Nov. 4, 2008) falls far short of the mark. Although both cases share a common background of nearly thirty years in which the FCC expressly declined to find that fleeting, isolated, or inadvertent broadcasts may be found actionably indecent, the Third Circuit explained that that "here, unlike in *Fox*, the FCC has not offered *any* explanation – reasoned or otherwise – for changing its policy on fleeting images." Pet. App. 27a (emphasis added). There is no dispute whatsoever about the controlling legal standard – that an agency cannot refuse to explain a fundamental change in policy. *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 42-43 (1983).

Even if the Commission were correct that the legal question at issue here and in *Fox* is identical, there would be no reason for the Court to review the same issue a second time. The Third Circuit decision is supported by other unique and independent grounds – which the FCC does not challenge through its petition for certiorari – such as that court's rejection of the FCC's multiple theories for finding CBS culpable for the broadcast at issue. Among other things, the Third Circuit held that the FCC did not establish the element of scienter, and that CBS could not be held liable on a theory of

respondeat superior for the actions of Janet Jackson and Justin Timberlake that led to the unforeseen exposure of Ms. Jackson's breast for approximately one-half of a second. Thus, the Third Circuit ruled on a unique factual record, arising from circumstances that had never arisen before and are extremely unlikely to arise again. Consequently, the Court should deny the petition without delay.

STATEMENT OF THE CASE

A. The FCC's Restrained Enforcement Policy

1. For almost 30 years the FCC held consistently that isolated, fleeting, or unintentional broadcasts of allegedly indecent material were not actionable under rules adopted pursuant to 18 U.S.C. § 1464. When the Commission first articulated a definition of the statutory term "indecent," it consciously adopted a cautious approach to enforcement to avoid First Amendment transgressions. *A Citizen's Complaint Against Pacifica Found. Station WBAI(FM), New York, N.Y.*, 56 F.C.C.2d 94, 103-04 (1975) (*"FCC Pacifica Order"*) (concurring statement of Commissioners Robinson and Hooks) ("the statute ... on its face expresses no limit on our power to forbid 'indecent' language over the air, [but] the First Amendment does not permit us to read the statute broadly").

The FCC decided more than three decades ago that an indecency complaint would not be "actionable" for purposes of Section 1464 unless the licensee purposefully engaged in repeated and intentional presentations of indecent material. *See Petition for Reconsideration of a Citizen's Complaint Against Pacifica Foundation Station WBAI (FM)*, 59 F.C.C.2d 892, 893 n.1 (1976) (*"Pacifica Reconsideration Order"*). It explained that

inadvertent, isolated or fleeting transmissions of "indecent" language do not violate the law because it would be inequitable to hold a licensee responsible when "public events likely to produce offensive speech are covered live, and there is no opportunity for journalistic editing." *Id.* at 892. The FCC expressly defended the indecency rules in this Court using the same reasoning, arguing that the decision to craft an indecency standard based on a broadcast of a George Carlin monologue entitled "Filthy Words" must be "read narrowly, limited to the language 'as broadcast.'" *See* Brief for Federal Communications Commission, *FCC v. Pacifica Found.*, No. 77-528 (Mar. 3, 1978), 1978 WL 206838 at 25-26 (citation omitted). The FCC emphasized "the deliberate repetition of these words," noting that the case involved "prerecorded language with the words repeated over and over [and] deliberately broadcast." *Id.*

2. This Court took the Commission at its word and narrowly upheld the decision on the expressly limited basis the agency advocated. *FCC v. Pacifica Found.*, 438 U.S. 726, 742 (1978); *see id.* at 733 n.7 (citing *Pacifica Reconsideration Order*). Justice Powell explained that the Court approved "only the Commission's holding that Carlin's monologue was indecent 'as broadcast'" and "not the broad sweep of the Commission's opinion." *Id.* at 755-56 (Powell, J., concurring). In particular, he explained that "[t]he Commission's holding, and certainly the Court's holding today, does not speak to cases involving the isolated use of a potentially offensive word." *Id.* at 760-61. *See also id.* at 777 (Brennan J., dissenting).

Describing the context of a broadcast as all-important, this Court in *Pacifica* focused on the "specific *factual* context" of the FCC's indecency

decision regarding the George Carlin monologue. *Pacifica*, 438 U.S. at 742 (quoting *Pacifica Reconsideration Order*) (emphasis added). In this regard, the Court identified the same three contextual factors that were emphasized in the FCC's decision and in its brief: (1) the broadcast involved "prerecorded language;" (2) the offensive words were "repeated over and over;" and (3) the offensive matter was "deliberately broadcast." *Id.* at 732 (quoting *FCC Pacifica Order*, 56 F.C.C.2d at 99). Although the Court briefly mentioned other contextual factors (*e.g.*, whether the case involved "a two-way radio conversation between a cab driver and a dispatcher, or a telecast of an Elizabethan comedy"), it did so only to the extent the content of the program, like the time of day of the broadcast, might affect "the composition of the audience." *Pacifica*, 438 U.S. at 750. This Court's majority opinion never suggested that the FCC may use "context" as a subjective factor to adjudicate indecency based on a program's "social value" or "capacity to offend."[1]

3. Based on the cautious policy it articulated and the narrow holding in *Pacifica*, the FCC consistently declined to find violations of its rules in cases involving the fleeting, unintentional, or inadvertent broadcast of allegedly indecent words or images. In its first opportunity to apply the Court's decision, for example, the agency rejected a

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[1] Only three Justices joined Section IV.B of the opinion. *Id.* at 744-48. A majority of the Justices expressly declined to empower the FCC to make *ad hoc* content-based judgments about the relative merits or probable offensiveness of programs by reference to "context." *See Pacifica*, 438 U.S. at 761 (Powell, J., concurring); *id.* at 762-63 (Brennan, J., dissenting).

television station license challenge on indecency grounds, rejecting a petition against the licensee that contained lengthy descriptions of "objectionable" programs including some that depicted nudity characterized as "offensive, vulgar and otherwise ... harmful to children." *See WGBH Educ. Found.*, 69 F.C.C.2d 1250, 1250 (1978). In particular, the complaint singled out one program that relied "primarily on scatology, immodesty, vulgarity, nudity, profanity and sacrilege for 'humor,'" as well as "other programs which allegedly contain nudity and/or sexually-oriented material." *Id.* The Commission, honoring "the narrowness of the *Pacifica* holding," declined to find a violation of the rules where the allegedly indecent words and images were not "repeated over and over as a sort of verbal shock treatment." *Id.* at 1251, 1254.

For almost a decade after *Pacifica*, the FCC strictly limited its enforcement of Section 1464 to the exact "seven dirty words" in Carlin's monologue and nothing else. In 1987, however, in a series of cases involving allegedly indecent radio broadcasts, the Commission found that the "generic definition" articulated in its original *Pacifica Order* could properly be applied to broadcast expression beyond the seven specific words made famous by George Carlin.[2] In so doing, the Commission reaffirmed the requirement of a restrained approach that "Section 326 and the First Amendment dictate." *Infinity*

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[2] *See Pacifica Found., Inc.*, 2 FCC Rcd. 2698, 269, *aff'd on recon., Infinity Broad. Corp. of Pa.*, 3 FCC Rcd. 930 (1987), *aff'd in part, rev'd in part, Action for Children's* Television *v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988) ("*ACT I*"). *See also Regents of the Univ. of Cal.*, 2 FCC Rcd. 2703 (1987) (same subsequent history); *Infinity Broad. Corp. of Pa.*, 2 FCC Rcd. 2705 (1987) (same subsequent history).

Broad. Corp. of Pa., 2 FCC Rcd. at 2705. On review, the D.C. Circuit affirmed the "generic definition" for construing Section 1464, but also expressly reinforced the First Amendment principles that limit the statute's scope. Then-Judge Ruth Bader Ginsburg wrote that "the potential chilling effect of the FCC's generic definition ... will be tempered by the Commission's restrained enforcement policy." *ACT I*, 852 F.2d at 1340 n.14 (citing *Pacifica*, 438 U.S. at 761 n.4 (Powell, J., concurring)).

The Commission staff routinely applied the "generic definition" of indecency to dismiss complaints against broadcasts that allegedly contained brief images of nudity.[3] The record in this case included seven informal staff decisions issued between October 1989 and August 1992 dismissing such complaints as "not actionably indecent." Pet. App. 31a-32a. Conversely, in 1988, the FCC announced a Notice of Apparent Liability ("NAL") for the broadcast of a movie that depicted explicit nudity and sexual activity, finding apparent liability because, it said, the "scenes were neither isolated nor fleeting." *KZKC(TV), Kansas City Mo, Apparently Liable for $2,000 Fine for Indecent Broadcast*, Report No. MM-328 (June 23, 1988). That NAL was later rescinded after the D.C. Circuit held in *ACT I* that the FCC had failed to articulate a reasoned basis for its "safe harbor" period, which defines the time of day when children are not likely to be in the audience and when broadcasters may air indecent material. *Kansas City Television, Ltd. (KZKC-TV)*, 4 FCC Rcd. 6706 (1989). *See ACT I*, 852 F.2d at 1343 n.18; *Action for Children's Television v.*

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[3] At this time, the vast majority of indecency complaints were decided on delegated authority by the FCC staff.

FCC, 932 F.2d 1504, 1509-10 (D.C. Cir. 1991) ("*ACT II*").

4. The FCC maintained its cautious enforcement policy regarding fleeting or inadvertent broadcasts until March 2004 – six weeks after the Super Bowl broadcast at issue in this case – when it first expressly abandoned it in *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 FCC Rcd. 4975 (2004) ("*Golden Globe Awards*"). The Commission later vacillated over whether it had actually changed its policy, *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 FCC Rcd. 13,299, 13,306 (2006) ("*Omnibus Order*") (describing prior policy as being "based largely on staff letters and dicta"), but ultimately defended its decision by acknowledging it consciously had made a change. *See* Brief for Federal Communications Commission and United States, *Fox Television Stations v. FCC*, No. 06-1760, at 19 (2d Cir. Dec. 6, 2006). However, in *Fox Television Stations v. FCC*, 489 F.3d 444, 458 (2d Cir. 2007), the Second Circuit held that the Commission "provide[d] no reasonable explanation for why it has changed its perception that a fleeting expletive was not a harmful 'first blow' for the nearly thirty years between *Pacifica* and *Golden Globes*." The court also expressed doubt about the FCC's ability to satisfy constitutional concerns. With respect to the First Amendment issues, the Second Circuit, in *dictum*, expressed sympathy with "the Networks' contention that the FCC's indecency test is undefined, indiscernible, inconsistent, and consequently, unconstitutionally vague." *Id.* at 463.

B. The Decisions Below

The Third Circuit decision that the Commission asks this Court to review vacated a $550,000 fine imposed on CBS for violating 18 U.S.C. § 1464. The FCC imposed the fine despite the undisputed findings in the record below that CBS did not plan, authorize or approve the unscripted stunt that resulted in the exposure of Janet Jackson's breast for 9/16 of a second at the end of the 2004 Super Bowl halftime show. Citing what it described as "an unprecedented number of complaints," the Commission issued an NAL concluding that the exposure, despite its brief nature, "was designed to pander to, titillate and shock," and that the broadcast was willful under 47 U.S.C. § 503(b)(1). The NAL proposed a then-maximum $27,500 fine for each of 20 CBS-owned stations.

The FCC issued an order affirming the forfeiture, over CBS's opposition on constitutional and statutory grounds, holding it was irrelevant that CBS did not intend to air any nudity. The order held CBS acted "willfully" because it was liable for the performers' conduct under the doctrine of *respondeat superior*, and it rejected CBS's arguments that the forfeiture was inconsistent with FCC indecency policy and violated the First Amendment. CBS sought reconsideration, but the FCC reaffirmed the $550,000 fine and again rejected all constitutional claims.

On CBS's petition for review, the Third Circuit vacated and remanded the forfeiture order. The court found that the FCC's consistent enforcement policy had been to treat both fleeting or unintentional words and images as "not actionably indecent." Pet. App. 9a, 18a. It rejected FCC claims

that pre-*Golden Globe* precedent put broadcasters like CBS on notice that even isolated or fleeting indecent material could be actionable, and that its policy on fleeting or isolated material applied solely to expletives. Pet. App. 18a-23a, 28a-29a, 37a. Consequently, the Third Circuit held that the decision to impose a forfeiture on CBS was an unexplained departure from prior FCC policy.

In view of this policy change, the court held that fining CBS for approximately a half-second of nudity during a live halftime show constituted arbitrary and capricious agency action because the FCC "failed to even acknowledge" the departure, "let alone supply a reasoned explanation" for it.[4] The court held that "unlike in *Fox*, the FCC has not offered any explanation – reasoned or otherwise – for changing its policy," and instead claims that "no policy change occurred when it [held] the Halftime Show[] ... actionably indecent." Pet. App. 27a. The court rejected the FCC's "reading of [its] policy on fleeting material ... untenable" and held that its "unsubstantiated contentions in this regard contradict the lengthy history of ... restrained enforcement policy." Pet. App. 20a-21a.

The Third Circuit held that its APA finding was sufficient to vacate the forfeiture. It also rejected

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[4] Pet. App. 27a. The court also was skeptical about the Commission's assertion of an "unprecedented number" of complaints regarding the broadcast. The Third Circuit found the record "unclear on the actual number" especially given CBS's showing that of over 542,000 complaints the FCC claimed to have received, over 85 percent were form letters from single-interest advocacy groups, and approximately 20 percent were duplicates, with some found in the record up to 37 times. Pet. App. 3a n.2.

the FCC's application of *respondeat superior* and its attempts to impose nondelegable duties and/or strict liability on CBS. It concluded that broadcasters cannot be vicariously liable for speech or expression of independent contractors because the First Amendment requires scienter to impose liability. The court remanded the case to the Commission to determine the correct standard for "willfulness" with the understanding that "[f]urther action by the Commission would be declaratory in nature, as the agency may not retroactively penalize CBS." Pet. App. 80a.

Judge Rendell issued an opinion concurring in part and dissenting in part. She wrote that the majority's discussion of scienter in *dictum* was unnecessary, and took issue with the need for a remand. Pet. App. 81a-82a.

REASONS FOR DENYING THE PETITION

I. THE DECISION BELOW PRESENTS NO ISSUE FOR WHICH REVIEW BY THIS COURT IS NEEDED

A. There is No Issue that Justifies Granting Certiorari

1. This case presents no dispute on any question of law that would justify granting the FCC's petition for certiorari. The FCC does not allege any conflict among Circuits here, nor does it identify any important question of federal law that must be settled by this Court. Rather, it argues only that the Third Circuit "erroneously construed the Commission's policies on broadcast indecency." Pet. 13. The Commission does not allege that the Third Circuit misstated the applicable standard, merely that it misapplied it. Pet. 18. However, it is well-

settled that this is not a basis for review by this Court. Sup. Ct. R. 10. *See Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 79 (1954).

2. The FCC's argument that there is "substantial overlap" between this case and *Fox* provides no reason to grant the petition, for it misconstrues the legal question at issue. Although the FCC's formerly restrained indecency enforcement policy provides a common backdrop for both cases, the question in *Fox* is whether the Commission's explanation of an *acknowledged* change in policy was sufficient, while the question here is whether the FCC changed its policy *at all* prior to the broadcast under review. Pet. 10. The difference between the Commission's posture in the two cases ("our explanation was sufficient" versus "we need no explanation") is critical, for there is no dispute whatsoever about the controlling law. As the Third Circuit held, "the FCC's policy change must be set aside as arbitrary and capricious, because it has failed to even acknowledge its departure from its former policy let alone supply a 'reasoned explanation' for the change." Pet. App. 27a. Further review thus would be futile, because the Commission's appellate lawyers cannot now supply an explanation that the agency failed to give. *State Farm*, 463 U.S. at 50 ("[T]he courts may not accept appellate counsel's *post hoc* rationalizations for agency action. It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself.") (internal citations omitted). Accordingly, a decision on the APA issue presented in *Fox* does not control the outcome of this case.

Moreover, review would be unwarranted even if the FCC is correct in its claim that the issue

presented here is the same as in *Fox*. Indeed, the petition should be denied *especially if the issue presented is identical*, since this Court already is considering in *FCC v. Fox* whether the FCC may change its policy toward fleeting material based on the agency's explanation in the orders at issue in that case. Nothing would be gained by granting the petition to consider the same question twice, nor would doing so alter the practical outcome of the decision below. Although the Commission seeks review so that it may "enforce the sanctions it levied against CBS," Pet. 14, the Commission expressly declined to seek review of another issue necessary to that goal – the requirement of showing scienter. Pet. 23 n.3; Pet. App. 39a. Separately from the APA finding, the Third Circuit rejected the FCC's myriad and shifting rationales for imposing liability on CBS for the performers' actions. Pet. App. 39-79a (rejecting the FCC's three theories of liability). The Commission's assertion that it "would be free to impose a forfeiture on remand," Pet. 23 n.3, fails to take into account the Third Circuit's unchallenged finding that "[t]he scienter element of the indecency provisions – as a constitutional requirement – is paramount." Pet. App. 73a. Consequently, there is no reason to put off a decision on the petition until a decision is rendered in *Fox*, and the Court should deny the petition without delay.

3. The Third Circuit's decision does not "call[] into question key aspects of the Commission's broadcast-indecency enforcement regime," as the FCC asserts. Pet. 20. The Commission cannot claim in this case, as it did in *Fox*, that the decision below placed a constitutional cloud over its enforcement

authority in order to obtain review by this Court.[5] The Third Circuit opinion did not address the constitutional arguments regarding fleeting images in dictum or otherwise, so the Commission is precluded from making the same argument here.

In this regard, the Commission's argument that the Third Circuit's decision has deterred it from making a policy change or enforcing its indecency rules must be viewed skeptically. Nothing has prevented the Commission from taking action "with respect to any of the numerous pending complaints involving the broadcast of brief images" that it claims are pending.[6] The FCC does not indicate how many complaints it is holding, whether they also

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[5] In seeking certiorari in *Fox*, the FCC argued that the Second Circuit's constitutional analysis, set forth as *dictum*, "effectively nullifie[d] the Commission's prohibition on indecent language," rendering remand for additional explanation illusory. Br. in Supp. of Pet. for Cert., *FCC v. Fox*, No. 07-582, at 15, 29 (describing remand as "a Sisyphean errand"). However, after it obtained review, the Commission changed its position to contend that the broadcasters were "precluded from raising their constitutional challenges in this Court," and that the Second Circuit's analysis was nothing more than "dicta." Br. of Petitioners, *FCC v. Fox*, No. 07-582, at 42, 43.

[6] Pet. 20. For example, nearly five years ago, after the FCC issued an NAL for the broadcast of fleeting nudity in *Young Broadcasting*, the licensee filed an extensive opposition arguing, among other things, that the proposed forfeiture violated the Commission's established policy against penalizing such accidental and fleeting broadcasts. *Response to Notice of Apparent Liability for Forfeiture of Station KRON-TV*, File No. EB-02-IH-0786 (Feb. 26, 2004) at 20-29. The Commission never responded to the opposition, and let the NAL lapse without taking further action, which is now time-barred. 28 U.S.C. § 2462 (establishing a five year statute of limitations for forfeitures).

may be barred by the statute of limitations, or whether the circumstances in a given case would counsel against imposing any penalty.[7] For the same reason, the Court should not base its decision to accept review on the extreme hypotheticals posed by the petition as to what broadcasters might or might not do if the formerly restrained enforcement policy is kept in place. Pet. 21. *See Pacifica*, 438 U.S. at 734-35.

The Commission's complaint that the decision below is deterring it from deciding other indecency cases rings quite hollow when the real issue is that the FCC simply has failed to act or explain its rationale in case after case. Granting review here would only make matters worse, by deferring the Commission's obligation to squarely address the administrative law and constitutional issues presented in the remand proceeding ordered by the Third Circuit. Certiorari is not to be used as a tactic to assist the FCC in its dereliction of statutory and constitutional duties.

B. The Third Circuit Decision is Correct

Like the Third Circuit, this Court should reject the "troublesome revisionist arguments" the FCC has employed "to avoid the implications of its own fleeting indecency policy." Pet. App. 36a-37a. In its petition, the Commission argues that the Third Circuit should have deferred to the Commission's interpretation of its prior decisions under

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[7] Because the Third Circuit found that the Commission's treatment of words and images has been indistinguishable, App. 28a-29a, the only pending complaints that supposedly are "in question" due to the decision in this case are those involving broadcasts that occurred before the March 2004 *Golden Globe Awards* order.

established principles of administrative law, and that the court erred by focusing on the Commission's broad analytical framework for evaluating broadcast indecency "which applies equally to words and images, rather than on the agency's specific statements regarding fleeting material." Pet. 13, 18. However, the Third Circuit's decision reviewed in detail the Commission's decisions regarding fleeting material – including fleeting images – and correctly found that the FCC's interpretation was "counter to the evidence before the agency," and "so implausible that it could not be ascribed to a difference in view or the product of agency expertise." Pet. App. 37a-38a (quoting *State Farm*, 463 U.S. at 43).

1. The Commission's claim that "the court relied on a purported 'fleeting images' exemption to indecency enforcement that never existed," Pet. 13, is premised on a demonstrably false assertion of fact – that "none of the prior administrative decisions that the court surveyed had exempted a brief image from indecency enforcement." *Id.* This statement ignores the Commission's order in *WGBH*, the first decision following *Pacifica*, where the agency rejected petitions to deny based on programs containing brief nudity and profanity. *See* Pet. App. 29a-31a. Additionally, the Third Circuit examined a series of staff decisions issued over a four year period dismissing complaints for fleeting images of nudity, and found that they illustrated that the FCC's policy toward fleeting words and images had been identical. Pet. App. 31a-32a.

The petition buries its discussion of these cases in a footnote, claiming that the decision in *WGBH* is not "significant" because the Commission did not specifically discuss "nudity," and the staff letters do

not "bind" the Commission.[8] However, there would have been no reason for the FCC in *WGBH* to separately analyze complaints about nudity because, as the Third Circuit found, "the Commission's analysis illustrates that 'words' and 'depictions' were treated identically for purposes of determining whether a broadcast was actionably indecent." Pet. App. 30a n.14. More significant is the fact that the Commission expressly relied on the policy of restraint articulated in *Pacifica*. *WGBH Educ. Found.*, 69 F.C.C.2d at 1254. The staff dismissal letters also are significant because they substantiate the Commission's established policy immediately after it adopted its generic approach to indecency in 1987.[9] The Third Circuit did not suggest that the Commission was somehow "bound" by prior staff decisions, but concluded only that the informal rulings demonstrated what the policy was and what the staff understood it to be.[10]

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[8] Pet. 19 n.2. The petition notes that the Third Circuit recognized that the staff dismissals were on "identical form letters" that merely announced summary dismissals finding the complaints "not actionably indecent." But the Third Circuit nevertheless found that the letters reflected established Commission policy. Pet. App. 32a.

[9] If the Commission had adopted a different policy toward fleeting images as the petition argues, the staff would not have been able to dismiss the complaints. For years, the FCC issued the vast majority of its indecency decisions – and virtually all of the dismissals – as informal letter rulings. Under the FCC's rules, subordinate officials are not authorized to act on "[m]atters that present novel questions of law, fact, or policy that cannot be resolved under existing precedents and guidelines." 47 C.F.R. § 0.283(c) (Media Bureau delegation); *id.* § 0.311(a)(3) (Enforcement Bureau delegation).

[10] Pet. App. 29a-30a. The Petition's citation of *Comcast Corp. v. FCC*, 526 F.3d 763 (D.C. Cir. 2008), is therefore beside

2. The Commission is unable to cite any case in which it actually explained that images were to be analyzed differently from words prior to this one, so the petition plucks two sentences from prior FCC orders – one from an older decision involving radio (which, given the audio-only nature of the medium, obviously did not involve images), and another from a policy statement – and claims that the policy was implicit in its dictum. Pet. 15-16. However, the Third Circuit correctly rejected these interpretations of precedent as "strained." Pet. App. 36a. As the court below found, the FCC "acknowledge[d] it had never explicitly distinguished between images and words for the purpose of defining the scope of actionable indecency," but contended only that "the existence of such a distinction was obvious, if unstated." *See* Pet. App. 28a.

a. The Commission's reliance on *Pacifica Found., Inc.*, 2 FCC Rcd. at 2699, is misplaced. That case helped establish the "generic" indecency policy but did not address the issue of "images" because it involved a radio broadcast. *See* Pet. 15. It was one of three declaratory orders issued on the same day that held only that the indecency definition applied to "a broader range of material than the seven specific words at issue in *Pacifica*." *Id.* The Commission did not purport to alter the indecency standard, but decided only to use the seven words of the Carlin monologue as "examples of, rather than a

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the point. Even if not bound by Bureau or similar lower-level orders, the Commission still must acknowledge changes from such decisions and explain the departure. *Community Care Found. v. Thompson*, 318 F.3d 219, 227 (D.C. Cir. 2003) (cited in *Comcast*, 526 F.3d at 769); *Ventura Broad. Co. v. FCC*, 765 F.2d 184, 193 (D.C. Cir. 1985).

definitive list of, the kinds of words" that may be considered indecent. *Pacifica Found., Inc.*, 2 FCC Rcd. at 2699. Each of the orders involved repeated and intentional broadcasts of material that the Commission deemed to be indecent under its newly fashioned generic standard, and did not purport to articulate a different regulatory approach for "depictions or descriptions" as distinguished from "expletives." The orders reaffirmed the principle that "deliberate and repetitive use in a patently offensive manner is a requisite to a finding of indecency." *Infinity Broad. Corp. of Pa.*, 2 FCC Rcd. at 2705. *See Infinity Broad. Corp. of Pa.*, 3 FCC Rcd. at 931 ("our application of Section 1464 must be consistent with the constitutional principles derived from the *Pacifica* decision").

If *Pacifica Found., Inc.* "made clear" that only fleeting words were non-actionable (and not images) as the petition now argues, Pet. 15, it is mysterious that the Commission did not cite it in the decisions below. Among the NAL, the Forfeiture Order, and the Reconsideration Order below, *there is not a single reference* to the decision that the FCC now identifies as a principal source of its authority for a purported distinction between expletives and all other indecency. The Commission first reinterpreted *Pacifica Found., Inc.* as setting forth a different standard for "expletives" versus "descriptions" in late 2006, in the *Omnibus Order*, 21 FCC Rcd. at 13,306-07. Yet, in the space of a few paragraphs, the agency itself rejected the newly discovered dichotomy, saying it is "artificial and does not make sense." *Id.* at 13,308. Accordingly, the Third Circuit properly found that "before *Golden Globes*, [the FCC] had not distinguished between categories of broadcast material such as images and words." Pet. App. 22a.

b. The Commission also cites language from its *2001 Policy Statement* as articulating a "distinction between expletives and other types of indecent material." Pet. 16. The Third Circuit noted that "the Commission points to one sentence" in the policy statement that "relatively fleeting references may be found to be indecent where other factors contribute to a finding of patent offensiveness," but found that "when read in its original context rather than as an isolated statement, this sentence does not support the Commission's assertion here." Pet. App. 19a. Neither the *2001 Policy Statement* nor the staff decisions cited therein articulated any different approach for images versus words. *See Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 FCC Rcd. 7999, 8008-09 (2001) ("*2001 Policy Statement*").

c. The Commission ultimately points to the Commission's aborted decision in *Young Broadcasting of San Francisco, Inc.*, 19 FCC Rcd. 1751 (2004), a case which was decided a few days before the halftime event that is the subject of the petition and which was allowed to die under the five-year statute of limitations. The Commission claims that *Young Broadcasting* should remove "[a]ny remaining doubt about the FCC's policy." Pet. 16. It is exceedingly, odd, however, for the FCC to attach such significance to the case when it never issued a final order after the licensee opposed the NAL. Further action is now barred by the statute of limitations. As a consequence, *Young Broadcasting* is not a final order and does not constitute binding FCC precedent.

Moreover, the NAL in *Young Broadcasting* never once suggested fleeting images should be treated differently from fleeting words. Rather, it expressly applied its body of case law involving fleeting language and held only that other fleeting references cases were "distinguishable because there was no finding that the material, in context, was pandering, titillating or intended to shock the audience." *Young Broadcasting*, 19 FCC Rcd. at 1755 n.35. *See* Pet. App. 33a. The petition suggests that the absence of an explanation of a policy change in *Young Broadcasting* must be taken as proof that, at some point in the past, the Commission *must* have made its policy clear, Pet. 17, but such sleight of hand is not supported by law. *E.g.*, *NCTA v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (policy reversal is "arbitrary and capricious" under the APA unless "the agency adequately explains the reasons for a reversal of policy"). In any event, it is not the court's obligation to explain why "the dog . . . didn't bark." *Cf. Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 63 (2004).

The Third Circuit provided a detailed analysis of *Young Broadcasting* and properly concluded that the case is "best understood as the Commission's initial effort to abandon its restrained enforcement policy on fleeting material." Pet. App. 33a-36a. Although the petition criticizes the court for relying on "the Commission's broad analytical framework for evaluating broadcast indecency" rather than particular decisions relating to fleeting broadcasts, Pet. 18, the court closely analyzed the reasoning of *Young Broadcasting* as well as the precedent on which it rested. Its analysis is sound and should not be disturbed.

d. Contrary to the government's suggestion, Pet. 19, the FCC has never used the aphorism "one picture is worth a thousand words" in its indecency decisions and therefore cannot rely on it now as an explanation of the agency's rationale. *State Farm*, 463 U.S. at 50. Moreover, the Commission's assertion that the decision below somehow is "at odds" with the Third Circuit's "recognition" of this concept is both irrelevant and wrong. Contrary to the Commission's argument, the Third Circuit has specifically rejected claims that "videotape evidence and other forms of evidence" have some special impact and should be treated differently. *United States v. Criden*, 648 F.2d 814, 816, 829 (3d Cir. 1981); *United States v. Martin*, 746 F.2d 964 (3d Cir. 1984). If anything, this line of cases provides an additional reason to deny review in this case.

3. In sum, the Third Circuit's careful and detailed analysis of the Commission's decision is entirely consistent with established principles of administrative law. The court was not required to defer to the Commission's interpretation of precedent, for, as the Third Circuit explained, "deference is inappropriate where the agency's proffered interpretation is capricious." Pet. App. 21a. *See Cassell v. FCC*, 154 F.3d 478, 483 (D.C. Cir. 1998). Additionally, as set forth in more detail below, deference is inappropriate where an agency's interpretation of its governing statute would raise grave constitutional concerns. *E.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 574-75 (1988). Accordingly, there is no issue that merits review by this Court and the petition should be denied.

II. THE DOCTRINE OF CONSTITUTIONAL AVOIDANCE STRONGLY SUPPORTS DENIAL OF THE PETITION

Although First Amendment arguments were briefed extensively below, the Third Circuit was able to decide the case without addressing the constitutional issues. Resolving the case narrowly in this manner comports with the doctrine of constitutional avoidance – the "fundamental and longstanding principle of judicial restraint requir[ing] that courts avoid reaching constitutional questions in advance of the necessity of deciding them." *Lyng v. Northwest Indian Cemetery Prot. Ass'n*, 485 U.S. 439, 445 (1988) (citing, *inter alia*, *Ashwander v. TVA*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring)). *See Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004). However, the FCC seeks review by this Court in the hope of winning a remand to the Third Circuit, and, eventually, "enforc[ing] the sanctions it levied against CBS." Pet. 14. Granting such review necessarily would entail constitutional adjudication, both as part of a more extensive APA analysis and because of the need ultimately to resolve the merits of the First Amendment challenge.

The Third Circuit avoided constitutional issues because it found, as a threshold matter, that the Commission in this case offered no explanation at all for its policy change. However, where an agency seeks to explain a change in policy that has inherent constitutional implications, the sufficiency of the explanation must be measured by how it addresses those ramifications. This is because the APA requires a determination of whether the agency action was "in accordance with law," including the Constitution. *See* 5 U.S.C. § 706(2)(A), (B)

(reviewing courts "hold unlawful and set aside agency action ... found to be ... arbitrary, capricious, ... or otherwise not in accordance with law," or "contrary to constitutional right, power, privilege, or immunity"). This Court's unanimous decision in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414 (1971), made clear that "[a]gency action is arbitrary and capricious if [it] fail[s] to meet ... constitutional requirements." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. Ruckelshaus*, 719 F.2d 1159, 1164 (D.C. Cir. 1983) (citing *Citizens to Preserve Overton Park*, 401 U.S. at 414). In APA review, "[i]t is not ... necessary to resolve whether [an agency's standard] violates the First Amendment" but rather, reversal is appropriate if it "raises difficult constitutional issues about ... First Amendment rights" because, "when an interpretation raises such constitutional concerns, the [agency] is not entitled to deference." *Allentown Mack Sales & Serv. v. NLRB*, 522 U.S. 359, 387-88 (1998) (Rehnquist, C.J., dissenting in part). *See also Solid Waste Agency v. United States Army Corps of Engrs.*, 531 U.S. 159, 173-74 (2001).[11]

The interrelationship between APA review and First Amendment analysis is particularly strong for the FCC, because it is empowered to regulate constitutionally-protected speech. The Communications Act charges the Commission with regulating under a "public interest standard [that] necessarily

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[11] This merely recognizes the basic rule that agencies are obligated to avoid statutory interpretations that raise grave constitutional questions. *Jones v. United States*, 529 U.S. 848, 857 (2000). *See also United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916) ("statute must be construed ... to avoid not only the conclusion [ ] it is unconstitutional, but also grave doubts upon that score").

invites reference to First Amendment principles." *FCC v. National Citizens Comm.*, 436 U.S. 775, 795 (1978) (quoting *CBS v. DNC*, 412 U.S. 94, 122 (1973)). Thus, as a general proposition, the FCC must "walk a 'tightrope'" to avoid statutory interpretations that intrude on First Amendment values. *CBS v. DNC*, 412 U.S. at 117. This obligation applies with particular force to the Commission's indecency rules that involve direct content regulation. *Pacifica*, 438 U.S. at 736-37; *2001 Policy Statement*, 16 FCC Rcd. at 7999, 8000. As this Court has made clear, the FCC may only regulate indecent expression "in a way consistent with First Amendment principles." *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 827 (2000).

The Third Circuit's conclusion, that "the Commission fail[ed] to acknowledge that it has changed its policy on fleeting material," Pet. App. 38a, did not require it to analyze whether the new approach to ephemeral material would create "grave constitutional concerns" or if it would violate the First Amendment.[12] Granting the FCC's petition, on the other hand, would require this Court in the first instance to determine whether the Commission's decision creates significant tension with applicable constitutional principles. Additionally, before the FCC would be permitted to "enforce the sanctions it levied against CBS," Pet. 14, a reviewing court also

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[12] The Third Circuit's general statement that the FCC's authority to regulate broadcast content is "constitutionally permissible," Pet. App. 10a, was merely part of a recitation of existing law, and did not purport to evaluate the constitutionality of a change in the restrained enforcement regime.

would have to go beyond the APA issue and rule on the substantive First Amendment claims raised below.[13]

In the proper case, a thorough review of the constitutionality of the FCC's indecency enforcement regime may well be justified, particularly given the vast changes in technology and the significant developments in the law since the 1978 *Pacifica* decision.[14] However, it is not necessary in this case for the Court to consider the constitutionality of Section 1464, or of its specific application to fleeting images. The Third Circuit's narrow decision best serves the doctrine of constitutional avoidance, and review by this Court is unnecessary.

CONCLUSION

The petition for a writ of certiorari should be denied because it presents neither a split in the circuit courts nor an important issue of federal law that requires this Court's review. Further, the Third Circuit decision below decided the case without addressing the constitutional issues, and granting the petition necessarily would entail constitutional

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[13] However, if this Court were to grant this petition, making adjudication of the constitutional questions unavoidable, then it should consider the First Amendment challenges directly, rather than initiating prolonged multi-stage review. *Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 364 (1999) (a prevailing party may "defend [the] judgment on any ground properly raised below").

[14] *See, e.g.*, *Ashcroft v. ACLU*, 542 U.S. 564 (2004); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002); *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803 (2000); *Reno v. ACLU*, 521 U.S. 844 (1997); *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727 (1996); *Sable Commc'ns of Cal. v. FCC*, 492 U.S. 115 (1989).

adjudication by this Court in conflict with the doctrine of constitutional avoidance. There is no reason to delay consideration of the petition, and it should be promptly denied.

Respectfully submitted.

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